UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

MARY ROSE REDDY, et al., Plaintiffs, v. NEW HAMPSHIRE ATTORNEY GENERAL, et al., Defendants.	*	14-cv-299-JL February 16, 2016 2:10 p.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

Appearances:

For the Plaintiffs:	Michael J. Tierney, Esq. Wadleigh, Starr & Peters, PLLC Matthew S. Bowman, Esq. Alliance Defending Freedom
For NH Attorney General:	Elizabeth A. Lahey, Esq. NH Attorney General's Office
For Municipalities:	Garry Lane, Esq. Ransmeier & Spellman
For Town of Greenland:	Samantha Dowd Elliott, Esq. Gallagher, Callahan & Gartrell
For City of Manchester:	Peter Chiesa, Esq. Solicitor's Office
Court Reporter:	Sandra L. Bailey, LCR, CRR Official Court Reporter U.S. District Court 55 Pleasant Street Concord, NH 03301 (603) 225-1454

BEFORE THE COURT

THE CLERK: The Court has before it for consideration today a motion hearing in Reddy, et al. versus New Hampshire Attorney General, et al., civil case 14-cv-299-JL.

THE COURT: Good afternoon, everybody. Why don't you identify yourselves for the record and then we'll get started.

MS. LAHEY: Elizabeth Lahey for the Attorney General.

MS. ELLIOTT: Samantha Elliott for the town of Greenland.

MR. CHIESA: Peter Chiesa, city of Manchester.

MR. LANE: Garry Lane for all the municipal and county defendants other than Manchester and Greenland.

THE COURT: Right. You've got the city of Concord plus all the counties.

MR. TIERNEY: Michael Tierney for the plaintiffs.

MR. BOWMAN: And Matthew Bowman for the plaintiffs.

THE COURT: All right. Thank you, everyone. All right, we're here on the constitutional challenge to the buffer zone statute which has been pending for a

while now, but we're here on motion to dismiss. Who will be taking the lead, I assume the AG?

MS. LAHEY: The AG's Office.

THE COURT: It's your motion, so why don't you proceed.

MS. LAHEY: Under United States Supreme Court precedent this case does not present a ripe justiciable case or controversy. All the parties agree that the correct test in this case is whether there's a credible threat of enforcement. Here there's no such threat because RSA 132:38 does not prescribe any conduct until a facility creates a zone. Thus until a zone is created there is nothing that could be enforced against the plaintiffs.

The statute at issue here is not the same as the statute in Massachusetts. The Massachusetts statute creates a mandatory fixed-size zone. The statute at issue here created the option for facilities to establish narrowly-tailored zones to fit the specific needs at each specific zone. And that distinction by the statutes is created by the up to language. And the statute provides that no person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius up to 25 feet. And so no prohibition can exist until a

facility gives meaning to the term up to 25 feet. And they do this as prescribed by the statute -- or as laid out in the statute, I'm sorry, by assessing the needs of their particular facility, getting city approval for the plan and demarcating the zone and hanging up a sign. And that's all outlined in the statute.

THE COURT: Well, but there's nothing, I mean, conceivably that could happen in 30 minutes, right? I mean, for all we know the consultations have happened, the signs have been made, they're ready to go, they're in the lobby but they haven't been hung. I'm not suggesting there's any evidence of this by the way, I'm just asking you. When you say narrowly tailored, I mean, conceivably tomorrow there could be a sign on every facility, a demarcated zone of 25-foot radius, and there would be nothing in the statute to prevent that as long as consultation, demarcation and signage had happened, right?

MS. LAHEY: I am not sure I understand the question, but conceivability wouldn't confer standing. So while that hypothetical could take place, those are not the facts that are before this Court. They haven't been alleged. So it wouldn't relate to the standing analysis.

THE COURT: Well, I think it does, so, why

don't you answer my question.

MS. LAHEY: Can you ask it again.

THE COURT: The question is, you said it is narrowly tailored.

MS. LAHEY: Sure.

THE COURT: And that the procedures are prescribed by statute. And they are, I agree with you. I mean, there's got to be consultation with law enforcement and I guess land use, signage, right? That's got to happen. There's got to be demarcation of the zone.

MS. LAHEY: Correct.

THE COURT: And there's got to be signage.

MS. LAHEY: Ah-hum.

THE COURT: My only point is that there's nothing in the statute to prescribe what considerations must be undertaken, you know, I mean, everybody could decide on 25 if they wanted to, there's nothing to prevent it from being 25 everywhere literally overnight.

MS. LAHEY: Well, there is a limitation in that when you read the statute in whole, when you look at the statement of findings and the purpose, it requires a balancing between the needs of the facility and the First Amendment. And so that does constrain what facilities can do. They're required by statute and

by legislative statement to consider the First Amendment rights of other individuals and weighing those against the need for ingress and egress to those facilities.

THE COURT: Just give me a moment.

MS. LAHEY: Sure. If you're looking -- it was exhibit --

THE COURT: I'm just looking at the statute.

MS. LAHEY: Yeah, it's at the beginning. It's in the statement of findings purpose. Down in section three it talks about weighing the rights.

THE COURT: All right. Actually, I'm really sorry, the statement of findings, is that in the RSA or is that in the public laws?

MS. LAHEY: No, it's in the public laws. And I think I miscited it in my motion. So it's in the public laws. I have a copy of it if the Court --

THE COURT: I have that too. I have that too. But that's not part of the statute.

MS. LAHEY: But it's part of what the legislature passed, so it is -- it's not housed with the statute.

THE COURT: There's nothing that creates a duty, there's nothing that charges -- that might be the purpose of the statute, that might be legislative intent and everybody's hope, but there's nothing in the statute

that requires the facility -- by the way, we're off on a tangent already and it's my fault, I interrupted, because we're not talking about the constitutional statute yet. But I'm just trying to ask, there's nothing in the statute that requires the facilities or the municipalities or anyone to undertake any specific considerations. Literally they could have a 30-second conversation where they say I think 25 feet would be good and everybody says, yeah, it's a good idea, and they demark it. I mean, there's nothing in the statute to prohibit that.

MS. LAHEY: I think that's correct, if you don't look at the findings and --

THE COURT: Well, who would look at the findings? What lawyer would, I mean, there's nothing, what lawyer would advise a client to undertake considerations that aren't required by law? They're not required by law. They appear to be findings that led to this legislation but they're not part of the statute. I mean, that's just a fact, right?

MS. LAHEY: Okay. Okay.

THE COURT: Is that a yes? You say okay, I mean, is that like a dismissive okay or is that you agree?

MS. LAHEY: No, no.

THE COURT: There's nothing in the statute that requires anything except consultation, demarcation and signage.

MS. LAHEY: Correct, there's nothing in, yeah, RSA 132.

THE COURT: And the number of feet involved, while you're correct, and I think it's important by the way, I agree, while the distance could be something much less than 25, the fact is in every case it could be 25.

MS. LAHEY: That's correct.

THE COURT: All right. Go ahead. I interrupted you. You were explaining how the statute's different than the Massachusetts statute.

MS. LAHEY: Sure. And so that's the language of the statute. To the extent that the Court finds that that language is ambiguous, go into the legislative history. The legislative history supports the state's interpretation of the statute, and that's for three reasons. First, the up to language was not in the original version of the statute. It was expressly added. And so the plaintiffs' interpretation would read out that expressly added language, and that would be improper under the canons of statutory interpretation. The legislature specifically chose to add that language, therefore the statute needs to be interpreted to give

meaning to that statute which is what the Attorney General's interpretation does.

And second, looking at the majority report, that also lays out that this statute does not create a fixed mandatory zone, and it talks about --

THE COURT: I think you're right about that. I will say that, you know, I haven't heard oral argument yet from the plaintiff, but based on what I've read I think your interpretation of the statute is more plausible. That doesn't mean I rule you out. I just -- you don't have to persuade me on that.

MS. LAHEY: Okay. So, given that the statute doesn't create, or it gives the option to create a zone other than mandating a zone, nothing is prohibited under the statute until a facility creates a zone, and so the fact that no facility has done that to date eliminates the possibility that there's standing here. And I just want to note that law enforcement and the Attorney General, because nothing had been created, their ability to enforce anything under the statute is conditioned on creation. So, they can't enforce what hasn't been created, so that's really the end of the analysis. If the Court is persuaded by our interpretation of the statute, then there's nothing that's been created, there's nothing to enforce, therefore it follows that

there's no threat, there can be no threat of enforcement.

Moving away from our standing argument, I just wanted to briefly address four arguments raised by the plaintiffs. And the first is their reference to New Hampshire Right to Life pact and First Unitarian and their argument that those cases are dispositive of the issues before this Court, and that position is incorrect because those cases involve state actions that prohibited conduct on the face of the statute. And so in New Hampshire Right to Life it dealt with a statute that limited campaign expenditures. There was no precondition to that limitation. Once the statute was on the books, the state had the authority to enforce that statute. That's different than here where there's no enforcement mechanism until there's been creation.

And the same is true under First Unitarian. That dealt with an easement that prohibited expressive conduct.

THE COURT: Let me dispense of one issue, then, based on that argument. I don't think it's going to be a controversy, but I should ask.

The idea that there can be no enforcement without establishment of zones, can I assume, then, that the other statutes like loitering, that law enforcement

is disavowing any sort of intent to enforce other statutes within the yet to be created zone areas?

MS. LAHEY: I don't think so. So I think if there was somebody harassing people or loitering outside of a Planned Parenthood location and Planned Parenthood called and asked law enforcement to come down and it was, you know, right in front of the entrance, I would anticipate law enforcement, I'm not speaking for law enforcement, but I would imagine that that would be enforced, but that is separate from, nothing would be enforced pursuant to this statute. It would be pursuant to some other statute that's already on the books or another section of the criminal code that's already on the books.

THE COURT: Right. But what about something like loitering, right, that didn't involve harassment, because harassment is a great example but it doesn't really involve --

MS. LAHEY: Yeah, I'm not familiar with the loitering RSA, so I don't know if you have to post loitering. I know I've seen signs around that say no loitering. I'm not sure if that's a prerequisite. If that were the case, then the answer would be no unless there's a no loitering sign posted. But if there is some other statute that required a posting or

demarcating and it's an otherwise valid unchallenged statute, I think that the expectation would be that law enforcement would enforce it, and that is what is contemplated under McCullen, that those are the types of things that these facilities would do prior to creating a facility, is work with the existing laws on the books to create a remedy that allows access to the facilities.

THE COURT: Okay.

MS. LAHEY: So, I touched on New Hampshire Right to Life. First Unitarian, it's the same thing. That case involved a deed with an easement and the deed on its face prohibited certain conduct, and so in that case, with a bit of a caveat, is that the deed delegated the ability to enforce to the private landowner, but that's not what this case is. This case is it creates, there's no prohibition on its face, so nobody can enforce it, where in that case there was a prohibition and the landowner could enforce it should somebody violate that.

So, the difference between this case and New Hampshire Right to Life and First Unitarian is that there is an existing prohibition on misconduct that doesn't exist here, and it doesn't exist here because nobody's created a facility. And instead, this case is really akin to Clapper which is a 2013 United States

Supreme Court case, and I have a quote that I --

THE COURT: Nobody briefed their argument in Clapper which was interesting. I mean, if you're going to be briefing it, by the way, just so you know.

MS. LAHEY: Okay.

THE COURT: Because I looked, I don't mean this disrespectfully, but I view it as a pretty significant oversight on everybody's part. But go ahead.

MS. LAHEY: Okay, so, to touch on it I think --

THE COURT: I'm glad to hear you're going to argue it though. Go ahead.

MS. LAHEY: Okay. So, in Clapper the court held that the plaintiffs can only speculate as to whether the government would seek to use the statute instead of one of the other, now I'm paraphrasing, but one of the other options available to it, and that the court said, it expressed that it was reluctant to endorse standing theories that required guesswork as how to challenge the decisionmaker -- I'm sorry, how the decisionmakers will exercise their judgment.

THE COURT: Yeah.

MR. LAHEY: And so that case is in a national security context. Clapper, and for this proposition,

has been cited for the First Circuit in Blum.

THE COURT: Blum.

MS. LAHEY: Yeah, recently, and so in a non-national security context. So I think this case is on point with Clapper in that all the legislature has done is created an option for these facilities and so it's not the court's role to guess whether a facility will ultimately use that option or whether, and not use one of the other options available. And so I think Clapper is guiding on that point.

The second argument is that the facilities have immediate plans to create zones. First, that ventures into summary judgment territory because it's attached a lot of other documents and testimony that wasn't included in the complaint. I think that's improper on motion to dismiss, nor do I think the Court really needs to get into that. But second, the record establishes that the way that that testimony was presented in the plaintiffs' papers is not correct, and so we would rest on our pleadings laying out the totality of that testimony and that it stands for the proposition that there's no current plan to create a zone. And third, this is sort of attenuated but even if the Court were to find that there was a generic threat of enforcement, we still wouldn't have the facts that we

would need to conduct this analysis which would be where the zone would be created, at which of the facilities, which size, what shape, what other efforts that facility had taken prior to creating a buffer zone, and all of those are necessary considerations under McCullen. So to the extent the Court finds there is some sort of threat of creation or threat of enforcement --

THE COURT: Well, wait a minute. What -- whenever we get into the constitutionality arguments --

MS. LAHEY: Yeah, this --

THE COURT: I kind of --

MS. LAHEY: Yeah, this doesn't -- it goes to the standing but it shows why we can't reach the constitutional question. So the constitutional question requires you to have an answer to where the zone is, what the size is, what other efforts had been taken.

THE COURT: Well, that's for an as applied challenge.

MS. LAHEY: But it's also for the facial challenge because that is what the Court considers --

THE COURT: We all agree, right, that this is a facial challenge and that McCullen is a facial challenge.

MS. LAHEY: I think -- this is where I think the disconnect is, is that I don't think that McCullen

stands for the proposition that a 35-foot zone can never be constitutional. What I think it stands for is that a 35-foot zone in Massachusetts, in 2000 --

THE COURT: No, but what I mean is that, you're right, but what it means is that statute creating a 35-foot zone was facially unconstitutional.

MS. LAHEY: But it's sort of facially unconstitutional as applied to Massachusetts at that time because --

THE COURT: Because it wasn't specifically tailored.

MS. LAHEY: Right, so, you know that same statute tomorrow could be constitutional in Kentucky if the underlying facts are the same. So I think --

THE COURT: If the record in Kentucky were different than the record in the Commonwealth.

MS. LAHEY: Right. And so I think with that caveat I think it was facially unconstitutional in Massachusetts but as applied at that time. So I think it doesn't stand for the proposition that you can never have a 35-foot zone, you just couldn't have it in Massachusetts in 2013 and 14.

So then the third argument is that the statute chilled speech, speech is chilled when the state takes an action that causes people to hesitate before

exercising their right for fear of legal repercussion. And so those risks aren't present here.

THE COURT: I'm not that focused on the chill versus threat because when you do the analysis it still comes down to the threat, the threat and the prosecution, whether it's incredible enough for prosecution.

MS. LAHEY: Right.

THE COURT: Whether you do the chill theory, that's under New Hampshire Right to Life, it comes down to the same analysis pretty much. There are two different types of injury, but I don't see how the, and the plaintiffs here are focused on the chill argument, but I don't see where it really makes much of a difference analytically, does it?

MS. LAHEY: No, and I don't think that's right because for there to be chilled there has to be a question about whether it's going to be enforced against you and --

THE COURT: Well, let's get down to it, then. It sounds like to me when you distinguish Right to Life, Right to Life has got an official prohibition, this statute doesn't because there can be no zone without establishment of a zone, right?

MS. LAHEY: Right.

THE COURT: So, basically every argument you made today, vis-à-vis standing as far as I understand it, that's the key.

MS. LAHEY: That's correct.

THE COURT: The fact is that there are no zones established yet, therefore there's no credible threat of enforcement.

MS. LAHEY: Correct. And for that same reason there can be no chill, because if a plaintiff or any plaintiff arrives at a specific site and there's nothing marked, there's no risk that anything will be enforced against you, so any fear of prosecution is not credible because there is no -- it's not reasonable because the statute cannot be enforced against you.

And the last point is this concept of unbridled discretion. And those are used in prior restraint cases. And this is not a prior restraint case because a prior restraint case would require the plaintiffs to go to the government and seek approval to speak. And so here there's no constraint on their ability to speak. They can go to any facility whenever they want and speak.

THE COURT: I agree with you that -- but this kind of raises the same question I want to revisit again.

MS. LAHEY: Okay.

THE COURT: I do agree with you that I don't think this is a prior restraint case, and I do agree that the whole unbridled discretion analysis is pretty much a prior restraint analysis, but it gets back to that question I wanted to ask before, and I want to make sure I have this answer. I don't think it really has a lot to do with today but it's still important to the Court, which is that other than the actions of consultation, signage and demarcation, there's nothing to limit the discretion, in the statute, there's nothing to limit the discretion of the zone creator as to the size of the zone or when to create the zone or why to create the zone, right? Any time they do those three things they could conceivably have a 25-foot zone.

MS. LAHEY: I think there is a limitation in that there could be -- it requires law enforcement approval, so theoretically --

THE COURT: No, it doesn't. Show me where it says law enforcement approval in the statute.

MS. LAHEY: It talks about --

THE COURT: It says consultation. Doesn't say approval. If it said approval it would be an entirely different argument I think.

MS. LAHEY: Well, it says -- let me just find

it.

THE COURT: Says right here, 132:38, III. Prior to posting the signage authorized, under paragraph two, a reproductive health care facility shall consult with local law enforcement and those local authorities with responsibilities specific to the approval of locations and size of the signs to ensure compliance with local ordinances.

MS. LAHEY: Right. So I would read that statute to say that law enforcement doesn't have any --

THE COURT: Approval authority.

MS. LAHEY: They do. I think that, I think the statute is somewhat ambiguous in that while it states the purpose for meeting with local authorities, and that relates to the sign, law enforcement has no role in enforcing local sign ordinances.

THE COURT: But the other ones do, the local authorities with responsibilities.

MS. LAHEY: Right. And so what is absent, though, is a purpose for meeting with law enforcement. And so when you go to the legislative history it talks about the requirement that you seek law enforcement's approval. And that's in --

THE COURT: I know but it's not in the statutes. I mean, you understand that, right? There's

no -- are you saying that if the police went to court and said, you know, name the town, the Manchester police went to court and said, hey, they've got a 24-foot zone but we only gave them approval for a 20-foot zone, where in the statute would that be grounds to enjoin them from having a 24-foot zone or a -- there's nothing. See, that's what I'm trying to ask you. I asked what in the statute limits the discretion as to the size of the zone, the where of the zone, the what of the zone. Other than those three things, which are just hoops to jump through, there's nothing.

MS. LAHEY: I would argue that the consultation with law enforcement could potentially limit it if law enforcement says, look, you don't need a 25-foot zone. There can be some back and forth and the zone is ultimately limited in that point.

THE COURT: Sure there can be back and forth, but if they disagree and the clinic wants 25 feet, what in the statute prevents there from having 25 feet? What law could the police department cite to say, you know, 20 feet would be better?

MS. LAHEY: If I were representing the police, I would cite to the consult and say look, they consulted with us and we said no.

THE COURT: And but a provision of a canon of

statutory construction is, you know, words mean what they mean, right? Consultation doesn't mean approval. It means consultation.

MS. LAHEY: But where it doesn't say the purpose of the consult I think it's --

THE COURT: Implicit?

MS. LAHEY: No, I think it that if it states, for the other it states who you're supposed to meet with and the purpose. So you're supposed to meet with local authorities for the purpose of determining the sign.

THE COURT: That's to make sure your sign is not too big or it doesn't protrude onto the sidewalk.

MS. LAHEY: Exactly, yup.

THE COURT: That one's kind of -- that one is interpretable. You can sort of see where it's going,

MS. LAHEY: Sure. But the deficiency in the statute is that it says meet with law enforcement but it doesn't provide a purpose.

THE COURT: I think that's a very, very true statement. It's a very, very true statement. It is a deficiency in the statute. Doesn't really matter much for today I don't think.

MS. LAHEY: No.

THE COURT: But it's a problem because, look, what that really reads like -- by the way, I'm with you,

I don't know what to make of it, you know, you could look at the legislative history and somebody says in the debate or the committee report, yeah, get approval, but that never made it to the statute, all right, and there's no one in the world that is going to enforce approval authority for local law enforcement based on this language. But, so what it sort of reads like is let the police know you made a zone, or you're going to make a zone so they at least know that there's a zone to enforce the law. That's how it -- am I speculating a bit? Yes, I am, but unless there's approval authority or some factors for someone to consider when making the size of the zone, when deciding when a zone is necessary, right, what other measures have been tried, McCullen, right, there's nothing in the statute that requires any of that. And I guess what you're telling me is, no, not maybe in the letter of the statute, judge, but if you look underneath in the legislative history you might find some guidance.

MS. LAHEY: Right. I think where we agree that there's a deficiency in the statute, that creates an ambiguity which is sufficient to get to the legislative history and therefore reading the approval requirement. If that's the intent of the statute, it says, I mean, the majority report talks about that

they're going to meet with local authorities to craft the zone and then --

THE COURT: Sure.

MS. LAHEY: So I think when you look at the legislative history you should read consult to include consult and approval.

THE COURT: You do, huh? Let me ask somebody else in the room here. Is there anybody else here who's willing to tell me that this statute gives localities approval authority over the size, time, place and the zones, anything other than the right to be consulted with, is anyone here ready to say that you have approval authority?

MR. LANE: Not, me your Honor.

MS. ELLIOTT: No, your Honor.

MR. CHIESA: No, your Honor.

THE COURT: All right, that's what I thought. Go ahead. It doesn't make a lot of difference today except the idea that, you know, except the idea that but for no one has created a zone yet, it could happen pretty quickly. It could -- you know, if you talk about New Hampshire Right to Life, a big part of New Hampshire Right to Life case and Blum is this concept of disavowal, right, where law enforcement authority says we're not going to enforce the statute.

MS. LAHEY: Right. But here they don't even have to disavow because there's nothing for them to disavow.

THE COURT: I know, you said that many times, but okay, tomorrow there's a zone.

MS. LAHEY: Then tomorrow they have standing and tomorrow we can come back here and argue the merits of the case because we will know what the zone looks like. We will know where it is. We will know what efforts were taken. Right now we don't know that.

THE COURT: Wait, wait, wait, wait, wait, wait. The McCullen efforts that were taken weren't the efforts of the clinics, they were the efforts of Commonwealth. Don't get confused about that, right? It wasn't like, you know, there are efforts that can be undertaken like injunctions and the things that were mentioned, right, but that's, you know, that's interesting but, and I agree it would be a much -- it would be an easier case to wrap our minds around when we have a real, a record, a factual record, but we do have the record of the legislation, and if there's evidence of other measures undertaken --

MS. LAHEY: Well, there is. There's currently a bill pending right now before the legislature that I just learned of, I've learned of it since -- I learned

of it actually this morning -- it's Senate Bill 542.

THE COURT: Just so I'm clear. So I'm supposed to look at the legislative history of pending legislation?

MS. LAHEY: No, you don't have to. It's just an example of other efforts that have been taken. I don't think it bears on the standing.

THE COURT: They're not efforts that were taken prior to the enactment of this statute, right?

MS. LAHEY: No. But there's nothing to be, I mean, it goes to the threat, this threat of creation. There's no, in addition to the facts that there's nothing to be created -- or I'm sorry, there's nothing that's been created that can be enforced, there are other efforts being undertaken that would basically make it a misdemeanor to harass people in front of facilities. So that is akin to --

THE COURT: Again, standing can only be established as of the day of the complaint.

MS. LAHEY: Correct.

THE COURT: Just the same way they can't say I gave them standing --

MS. LAHEY: No, I'm not saying --

THE COURT: Let me finish.

MS. LAHEY: Sure. Sorry.

THE COURT: I don't mean to -- but just the same way they can't say I gave them standing with the agreed to stay, right, which they want to call it an injunction and you don't and I understand all that. It's not an injunction, it was an agreement. But just the way, you know, I can't manufacture standing for them with that. You can't manufacture a lack of standing with ongoing efforts happening right now that have nothing to do with the facial challenge of the statute.

MS. LAHEY: No, and I'm not arguing that it bears on the standing announced just before this Court. What I'm using this as is a response to their argument that there's a threat of enforcement -- I'm sorry, there's a threat that a facility is going to create a zone. That's not the case. If you go to the records, the record establishes that's not the case. And as an aside, they're actually undertaking efforts to do something different than the facility. So I agree with you. It doesn't bear on standing at all. I'm raising it in response to their argument.

THE COURT: Fair enough. Fair enough. All right.

MS. LAHEY: So, if the Court doesn't have any further questions for me at this time I will sit, but if I have any response to them I will chime in at the end.

THE COURT: Thank you. Wait, I want to see if any of the other defendants want to be heard. Happy to hear from anybody who wants to be heard.

MR. LANE: Well, your Honor, I'm Garry Lane, we filed a separate motion but --

THE COURT: I did read it.

MR. LANE: Unless there's something specific that you want to question, our arguments are largely the same with the state with a few additional, but I don't think there's anything we have to address unless you would like to hear from us.

THE COURT: Understood. Anybody?

MR. CHIESA: Nothing more from Manchester.

MS. ELLIOTT: Your Honor, Samantha Elliott on behalf of the town of Greenland.

I have just one small thing to add, and I know, your Honor, you've read the motions and we joined in both the state's motion as well as the other municipal defendants' motions.

I just wanted to point out for the record that all of the arguments the state is making about standing in this case apply to the town of Greenland, but apply in some ways even more drastically to the town of Greenland because the state and Attorney General's office has a duty and an obligation to engage in

litigation to defend the constitutionality of state statutes.

THE COURT: Understood.

MS. ELLIOTT: The town of Greenland doesn't have any such duty. It's in this case, it's facing the possibility, it's incurring attorney's fees on its own part and facing the possibility of exposing itself to a claim of attorney's fees from the plaintiffs, has taken no position on the constitutionality of the statute and yet here we are. So, unless and until there's some sort of demarcation of a zone in Greenland, it doesn't seem to be an appropriate party.

THE COURT: Oh, all right. Understood.

MS. ELLIOTT: Thank you, your Honor.

THE COURT: My understanding, by the way, is while you join in the AG's arguments, the AG is here defending, moving to dismiss the case, but that is the only party defending the constitutionality of the statute, right? The other defendants are not defending the constitutionality of the statute at this point.

MS. ELLIOTT: Correct, your Honor.

MR. LANE: That's correct, your Honor.

THE COURT: Is that right?

MR. CHIESA: That's correct.

MS. LAHEY: Can I just actually add one thing

that I didn't --

THE COURT: Of course.

MS. LAHEY: It doesn't go to the merits of standing, but to the extent this Court grants the motion to dismiss, the state would request that in the order it states that any attorney's fees incurred to date go away and are not recoverable if down the road another case arises where a facility creates -- creates a zone and there's another case that goes forwards and they ultimately prevail on that, that the fees incurred in this case, if this case is dismissed, would not be recoverable in any future litigation.

THE COURT: Okay. Understood.

MR. TIERNEY: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. TIERNEY: As you are aware, I'm Michael Tierney. I'm here with my co-counsel, Matt Bowman, on behalf of our seven plaintiffs who have and seek to continue to sidewalk counsel women on public ways and sidewalks outside abortion clinics.

As you know, the plaintiffs have brought claims regarding both the facial unconstitutionality and that the statute is unconstitutional as applied to the particular cites mentioned in our complaint.

In particular we argue that the statute

violates the First Amendment by unconstitutionally delegating the authority to create no speech zones in public sidewalks to private actors, and that there is these content-based exemptions that allow pro-abortion speech and allow the ideological opponents of my clients to control their speech in the public fora.

THE COURT: But those content-based exceptions have already been pretty much rejected by McCullen, right? Those are not really -- to the extent the statute, I mean, your whole point is this statute is similar to the Commonwealth statute, not that it's different, and if it's similar it's not a content-based restriction of free speech.

MR. TIERNEY: That's incorrect. The McCullen decision was unanimous in that there was a lack of narrow tailoring, okay. There was a 5/4 split as to whether the exemption --

THE COURT: Sure, the five carries the day.

MR. TIERNEY: The five held that there was an insufficient factual record of what that exemption actually included. There wasn't a determination that that exemption, okay, was not content-based. There was a determination that based on the factual record before the Supreme Court, the Supreme Court specifically said --

THE COURT: Five justices said the statute wasn't content-based and no strict scrutiny.

MR. TIERNEY: That there wasn't evidence of what these escorts did. That's very different than here in New Hampshire where we have evidence that has already been presented to the Court that these escorts can engage and it's part of their job duty to engage in speech that's going to be comforting in getting the woman to come into the clinic. That's the evidence that was missing in the Massachusetts challenge and the Supreme Court determined in the 5/4 split that it was not content-based.

THE COURT: I see.

MR. TIERNEY: And, you know, we would have the --

THE COURT: You're not quibbling with my reading of McCullen, you're quibbling with the fact that this is the same factual scenario.

MR. TIERNEY: Correct.

THE COURT: Okay.

MR. TIERNEY: Correct. Now, in the pleadings and in the argument you just heard the state is basically ignoring the fact that we have a facial claim as well as that we have a pre-enforcement as applied claim. They're basically arguing that because it's

pre-enforcement you can't have an as applied claim, and they don't even really touch on the facial claim. We have standing for both of our claims, the facial and the as applied, which are both pre-enforcement claims.

The First Circuit in the New Hampshire Right to Life case put it forth very succinctly that standing exists even though the official charge with enforcement responsibility has not taken any enforcement action against the plaintiff. And this is a direct quote from the First Circuit, quote, does not presently intend to take any such action. In the New Hampshire Right to Life case the state had actually promised not to take any action if New Hampshire Right to Life engaged in the speech which they intended to engage in, and they still had standing.

You know, more recently we have another First Circuit --

THE COURT: The court in the Right to Life say that the fact that the, specifically said the fact that the AG came in in oral argument and defended the constitution of the statute, was evidence of an intent to enforce.

MR. TIERNEY: Yes, absolutely.

THE COURT: And nobody is talking about that in this case until you just did.

MR. TIERNEY: You just made the point for me, so.

THE COURT: Nobody is talking about Blum. Nobody is talking about Clapper. It's just sort of, I don't know what to say about it. I -- well, go ahead.

MR. TIERNEY: I think the First Circuit's case in Van Wagner which was a 2014 case found that when a regulation is alleged to vest unbridled discretion, when alleged to vest that discretion, that that's enough, okay, we don't need to approve the discretion that's been granted. I think it's pretty clear, even the state's making the argument, that the discretion has been granted to the clinic to determine the size and location, okay, we have standing under Van Wagner.

THE COURT: I don't think they conceded that point, no, but I understand your point. But, you know, those are prior restraint, you know, Van Wagner is a prior restraint case, that's the discretion we're talking about there. No one has to seek a permit to engage in the conduct that your clients are engaged in, right? So it's not really an unbridled discretion analysis, is it?

MR. TIERNEY: Well, it is, your Honor, and I --

THE COURT: But I concur with your point, by

the way, I do concur with your point that despite the findings leading up to the statute and the legislative history, I do think the statute affords pretty much unbridled discretion as to the size, up to 25 feet, the timing and the circumstances necessitating a zone. I do think that those, there's nothing in the statute that seems to me that limits the clinic's consideration of those issues at all. But that's unbridled discretion, it's unbridled discretion, but I don't know if it's unbridled discretion in the context of Van Wagner which is a prior restraint.

Do you see the distinction I'm drawing?

MR. TIERNEY: Well, the distinction is that in Van Wagner, okay, the discretion whether to approve the content on those billboards was held by a government official. In our case, the discretion whether to allow my client's speech is held by private clinics.

THE COURT: That's a distinction but it's not the one I'm talking about. I'm talking -- the discretion you're talking about is approving the content of speech, right?

MR. TIERNEY: Ah-hum.

THE COURT: You know, allowing speech, prohibiting speech based on content. That's not exactly the same as what's going on here. This is unbridled

discretion in the creation of a zone which has implications for speech but it's not a prior restraint, and for some reason you don't want to agree to that or -- is it that you don't agree with it or that you don't think it's significant?

MR. TIERNEY: I don't think that it is significant that the person who's deciding whether my speech is allowed, my client's speech is allowed, okay, is being given the ability to decide it on the fly basically, okay.

THE COURT: You see the difference, though, between discretion over content of speech in the prior restraint context and discretion over the creation of a zone.

MR. TIERNEY: I don't agree that there's a difference, and the reason why I don't agree there's a difference is because of the unbridled discretion given to the clinic. They can look at one of my clients and decide that because what she's saying on the sidewalk, love all let's say, that they don't have a problem with that, so they are not going to put up a zone, okay.

THE COURT: Sure, but --

MR. TIERNEY: But if my client is saying don't go here, go down the street, they can put up a zone.

THE COURT: Understood, but do you see the

difference, that one is prior restraint, one is you are not granted permission to undertake that speech, whereas the hypothetical you just put up the speech did occur. It wasn't a prior restraint, it was a reaction to speech. You see the difference?

MR. TIERNEY: But it can also happen prior to my client's speech.

THE COURT: Yeah. Okay.

MR. TIERNEY: Or after or in response to it, okay. And it can change multiple times in the course of a day. You know, there's no reason why the clinic couldn't have a ten-foot zone on a certain day when people they don't mind so much are out there or a 25-foot zone on a different day when they don't want those people out there. That's all allowed under the statute. Whether it happened or not is really irrelevant to the standing question.

THE COURT: That's interesting actually, yeah.

MR. TIERNEY: Now, in preparing the oral argument today we came across a First Circuit case that's on point, and I apologize that we didn't mention it, but this is the Rhode Island Association of Realtors v. Whitehouse, and that case held that there's a credible threat of prosecution and that the standard is quite forgiving in the First Amendment context, okay.

THE COURT: Quite forgiving is as old as Right to Life, though, isn't it, the quite forgiving? I think so.

MR. TIERNEY: The reason why I think the Rhode Island statute is on point is that that involved a statute that the state hadn't enforced against anyone ever. It had been on the books for 20 full years. The state had argued to the First Circuit it's been on the books for 20 full years, you know, there's no standing here. And the First Circuit rightly said 20 years isn't long enough. You need to have completely and fully abandoned the statute.

The granting of authority is facially unconstitutional right now, okay, that authority has been granted to clinics, and whether those clinics decide to exercise that authority or not is irrelevant to the standing question.

New Hampshire Right to Life case also said that when you're dealing with the pre-enforcement challenge, okay, that there will be, quote, assumption of a credible threat of prosecution in the absence of compelling contrary evidence.

THE COURT: Yeah.

MR. TIERNEY: Okay. And then so to the extent --

THE COURT: But what do you say about the, what Attorney Lahey would say, okay, is judge, we've got a huge big 800-pound piece of compelling contrary evidence which is the fact that no zone has been established and we, law enforcement, we have no enforcement authority without the demarcation of a zone. I mean, that is, I agree with you about the standard as announced in Right to Life, but address, address the contrary evidence, the lack of any created zone.

MR. TIERNEY: Well, I don't think that the intent of the clinics is something that we need to be discussing and should be helping the state's argument at all.

THE COURT: Well, you're the one that briefed it heavily.

MR. TIERNEY: We responded to the state's reference to the fact that there is no present intent. In their original motion to dismiss the state argued there is no present intent to put any zones in place. And in fact, the clinic said that there is no present intent because the state has asked us not to demarcate any zones while this litigation is pending, okay. That was said in the legislative hearing 2015. It was said just four days ago on February 10th at another legislative hearing on the new repeal bill. It was once

again repeated that the only reason why signs have not been demarcated is because the state had asked Planned Parenthood not to do so while this case is pending.

The plaintiffs have clearly alleged that as in paragraph 92 of the complaint that they desire to engage in this sidewalk counseling but they fear prosecution if they continue do to so. We have no answer from the state. We have no compelling response to the plaintiffs' clear allegation in the complaint.

The state's affiant, Linda Griebsch, had said that having the option allows her to negotiate if she does not like the behavior of the sidewalk counselors, okay. That is happening right now with the fact that she has been given, that the clinic has been given that power.

Now, the state also argues on page 12 of their motion to dismiss that the Court would be better served to wait until a buffer zone is actually created and enforced against the plaintiffs in the form of a written warning and probably a hundred-dollar fine before finding standing to challenge RSA 132:38, okay. So, the state is saying directly in its pleadings to this Court that they want to enforce it against one of my clients prior to us being able to challenge the constitutionality. There's really no clear threat than

what the state has said in its own pleading.

Now, the state appears to --

THE COURT: That's not a threat. That's a standing argument. I don't, you know, I don't consider it an argument that this can't be challenged until it's enforced as a threat of enforcement. That's sort of -- is that what you're saying?

MR. TIERNEY: The state has said in its pleading that they want to be able to enforce it prior to us having standing to challenge, okay. That is --

THE COURT: Yeah, that's a standing argument, that there's no standing without enforcement. I'm not sure I agree with their position, but that's their position. You're asking me to view that as a credible threat of enforcement.

MR. TIERNEY: That is very different than what happened in the Rhode Island case or the New Hampshire Right to Life pact case where the state says that they weren't going to enforce it. Right now the state is saying they are going to enforce it.

THE COURT: There's been no disavowal of this statute.

MR. TIERNEY: Correct.

THE COURT: That seems to be the case. Well, there's been a disavowal of the sense that they're

disavowing it in an intent to enforce it as long as there's not a zone, but it doesn't appear that the AG in this is saying that, and disavowal is, you know, in limited cases, especially the recent cases, it's almost the linchpin of this standing analysis.

MR. TIERNEY: Absolutely.

THE COURT: And we don't have it here.

MR. TIERNEY: Absolutely.

THE COURT: We have it here only in the sense that the state says it's disavowing any enforcement without the creation of a zone. But, you know, this starts to look like it's coming down to this Court has to assess the likelihood that someone is going to create a zone, which is hard to do on this record by the way, because I think that can literally happen overnight. That might not even matter under the state's analysis, but it doesn't seem like it's a huge brick wall of a barrier to enforcement. It seems like it's something that could happen relatively quickly and easily.

MR. TIERNEY: I would agree, your Honor, and to the extent the Court finds the intent of these private parties at all relevant we should at the very least be given an opportunity to do discovery into those particular clinics that we've named in our complaint if those facts are relevant. We don't believe they are

relevant, particularly not for our count number two where we allege that the statute has unconstitutionally delegated authority to a private actor to control speech in the public forum.

Now, there's an overriding argument throughout the pleadings that we have to wait until that authority is exercised to see how they draw things and how it affects different things given the specific facts on the ground, and that isn't the case, okay. The narrow tailoring needs to happen prior to the enactment of the statute. And we would actually argue that there needs to be strict scrutiny prior to the enactment of the statute delegating that authority. This isn't something that a private party does after being given the power and there's no provision in the statute requiring the private party to do anything other than to determine up to that 25-foot limit.

There is another recent case out of the First Circuit which makes clear what we have known for a long time that a restriction on speech in a traditional public forum, and the First Circuit is dealing with a content-neutral restriction on speech in a public forum, is facially unconstitutional if it does not survive the narrow tailoring inquiry even though the ordinance may seem to have a number of legitimate applications, okay.

So the state's argument that we should wait until something is actually drawn and then, you know, maybe it might be legitimate is irrelevant to our facial claims. As it said in Cutting v. City of Portland, Maine, 2015 case from the First Circuit, even if there were a legitimate number of applications, something we don't concede, but even if there were, that would not divest us of standing, that would not cause us to lose our facial claim, it would still be facially unconstitutional and we'd still have standing to go forward on that right now.

THE COURT: It's an interesting question, yeah, I mean, you know, Attorney Lahey and I had a discussion about whether it was really a facial challenge and whether McCullen was really a facial decision, and I thought she gave me a good faith interpretation of that, but it does seem counterintuitive to the Court that one would need enforcement, actual enforcement for a facial challenge.

Does that make sense, Attorney Lahey? Do you understand what I'm saying? I mean, you gave me an understanding of McCullen as yes, facial, but facial based on a real history and evidence that developed, and I understand that. But it doesn't make sense, does it, to say that we have to have actual enforcement, an

actual enforcement action for a facial challenge?

MS. LAHEY: Well, that's exactly what happened in Clapper. I mean, they have found no standing because the statute had never been enforced, no one had ever exercised their authority, and so no, I don't think that that is improper here, because the facial analysis hinges the, it hinges on the underlying facts. And maybe, you know, the McCullen decision is a little unique in that regard. And so I think given the facts of this case I think you do need enforcement before you can even reach the facial challenge because you then have the question of which plaintiff, which location, are we going to look at Greenland, are we going to look at Manchester, are we going to look at Concord, you know, all of the efforts are different, all of their histories are different. So the statute, if -- McCullen doesn't go so far as to say no matter when and where they are enforced, 35-foot buffer zone is unconstitutional.

THE COURT: Right.

MS. LAHEY: You need to look at the underlying facts. So you need to do that here with ours, and you need to look at --

THE COURT: But certainly the law is not that enforcement is required for standing. I mean, it's one

of the -- I mean, it's black-letter law. You can have pre-enforcement First Amendment challenge.

MS. LAHEY: Sure. I don't think unnecessarily -- I'm not conceding that if somebody created a zone there's automatically standing because I think there are probably some arguments to be made, but here I'm not arguing that there needs to be enforcement, there needs to be creation.

THE COURT: A zone.

MS. LAHEY: There needs to be creation and we can't conflate --

THE COURT: And you actually anticipated my question. So that's your position. It isn't that you need a citation or a warning or an arrest in your view. To confer standing you have at least, you have to have a zone.

MS. LAHEY: Right. And I think what it boils down --

THE COURT: A demarcated signed consulted zone.

MS. LAHEY: Correct. The standard is not threat of creation. It's threat of enforcement. So under the plaintiffs' analysis you would be basically speculating as to creation to then get to speculation of enforcement. You would at least need that first step to

put this case on par with all the other cases that he's cited. Creation has occurred in all of those other cases. Creation hasn't occurred here. It would be the same thing as saying this legislation is winding its way through the legislature. If the legislature passes it and creates a zone, then it would infringe on our rights. So we should enjoin the legislature from passing this.

You have to let them create it first and then deal with the question of whether there's a threat of enforcement.

THE COURT: Go ahead.

MR. TIERNEY: As you might expect, your Honor, I disagree. You know, I think that once it is created you have that immediate injury of the chilling of the speech. I don't think there's any substantial dispute that when those signs are put up and the government has enforcement power to enforce any speech of my clients within those zones, that there can be no dispute that speech is being chilled at that point.

THE COURT: Once the zones are demarcated and signed.

MR. TIERNEY: Right.

THE COURT: Yeah.

MR. TIERNEY: You know, we argue that the

plaintiffs' speech is being chilled right now. The state hasn't answered that allegation in our complaint, and that complaint allegations need to be taken as true that factual allegation.

THE COURT: Yeah, but a lot of it says your, there's a lot that says your, you know, bare allegation of chill does not confer standing. There's law that says that. It's too speculative. Right? I mean, you're say, you know, I can point out they're out there doing it now, but your point is they're out there doing it now because of this Court's stay order, right? But the fact is, the chilling that you allege is more of a, it's a, it's pretty aetherium, right? It's sort of inchoate.

MR. TIERNEY: I disagree, your Honor. The chilling is occurring right now because those private clinics are given the negotiating tool as Ms. Griebsch called it, okay, in order to use the authority given to the private clinics to try to squelch my clients' First Amendment rights, okay, that's what the states' own affiant had testified to in her affidavit that was submitted to the Court.

Now, we didn't brief the Clapper decision because nobody had brought it up.

THE COURT: When they moved to dismiss they

didn't raise it and I realize that.

MR. TIERNEY: Yeah. But my understanding is that with the Clapper case, that that was a five part speculative contingency before liability. Five parts. The state's arguing as soon as a clinic, you know, demarcates a zone, it can happen in 5, 25, 30 minutes, okay, that enforcement authority happens right then and there in that 30-minute segment, okay, and that's a whole lot shorter of a period than was the case in Clapper.

We have a great case from the First Circuit where it talks about the fact, give me a second here, that, quote, the fact that the deleterious affect of a statute is indirect will not by itself defeat standing. They go on to say that the requirement that an alleged injury be fairly traceable to the defendant's conduct does not mean the defense action must be the final link in the chain of events leading up to that harm. Okay, that was out of the Wine and Spirits case from the First Circuit. It is Wine and Spirits v. State of Rhode Island, 418 F.3d 36, a 2005 case. And in that case the First Circuit rightly recognized that the injury that was complained of is the state's enforcement injury even if the injury may have taken another person's step in order for that enforcement to happen. That's different

from the five-step analysis in Clapper.

THE COURT: Yeah.

MR. TIERNEY: There also is a discussion, I heard the state discussing earlier, that there's a presumption that the clinics are going to act constitutionally and do the narrow tailoring when drawing the zones. I think the Court needs to go no further than the City of Lakewood, a U.S. Supreme Court case in which the Supreme Court had said that it would be inappropriate to presume that the mayor, okay, will deny a permit application only for reasons legitimately related to health safety or the welfare of Lakewood citizens, okay.

The Supreme Court rightly rejected that when you have the authority, it isn't limited by standard, okay. You can't presume that that government act or the city mayor is going to act constitutionally, and I don't think you can presume that a private clinic will act constitutionally either.

The state skips over the SBA List case, SBA List v. Driehaus, Supreme Court case from 2014 in which the SBA List was found to have standing even though this was a pre-enforcement facial challenge and there wasn't any independent act by that private actor that was necessary in that Ohio statute in order for the

plaintiff SBA List to have standing. In that case you need to have the idealogical opponent of SBA List, okay, bring a complaint to the agency prior to the agency having an authority to squelch SBA List's speech, okay. And the state had argued that because you need that private actor to bring the complaint prior to taking that next step, that there was no standing. Supreme Court disagreed in that case, and likewise the Court should find standing in this case.

The state had delegated the authority up to the 25 feet, and we have the facial claim and we also have a pre-enforcement as applied claim. Given the undisputed fact as far as the clinics mentioned in the complaint, the undisputed facts given the physical attributes as to how their driveways are set up and so on and so forth, we can have a pre-enforcement as applied --

THE COURT: Your as applied action is based on applying the law as enacted to giving physical, you know, scenarios.

MR. TIERNEY: Absolutely.

THE COURT: That's the application. Not that it's been enforced, applied in that way, but that if you apply the law to these locales.

MR. TIERNEY: Correct. And the reason why is

because if you look at say the Manchester location, every inch that would be covered by the buffer zone would be public fora. It would be the sidewalk and ways public property which are the traditional province of First Amendment rights. Very different than in other places such as in Massachusetts where you have a clinic set very far back away from the road that from the door is all effecting private property. All locations alleged in the complaint, every inch of a buffer zone would be public fora.

There was an allegation that the shape and the size are all necessary considerations under McCullen. That is both irrelevant to the standing analysis and quite frankly untrue. Under McCullen you have the narrow tailoring analysis. The narrow tailoring analysis is focused on the actions that the state has taken prior --

THE COURT: I'm not focused on the constitutionality of the statute. I'm focused on standing. What about this idea. One of the reasons I bring up Blum and Clapper is that they both make the point that the objective reasonable test isn't really the test. It's this certainly impending test. Enforcement is certainly impending. Now, isn't that a more difficult standard for you to satisfy than the old

test applied by the Second Circuit in Clapper?

MR. TIERNEY: Well, there's a different test when you're dealing with First Amendment claims than you're dealing with claims outside the First Amendment, okay. We have numerous cases which hold in the context of the First Amendment, it's a very, very easy threshold to cross --

THE COURT: Yeah, but the test is certainly impending now.

MR. TIERNEY: There was no, in Van Wagner, allegation, you need to have certainly impending. In Van Wagner the First Circuit recognized all it needs to have is there needs to be an allegation of unbridled discretion.

In the SBA List 2014 Supreme Court case there was no allegation that something would have to be impending. It was just that elections happen every two years. Litigation takes a long time. SBA thought they might engage in --

THE COURT: Blum versus Holder.

MR. TIERNEY: Blum versus --

THE COURT: Thus we have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact. And it goes on to point out that Clapper pretty much drove that point home. Clapper

rejected the objective reasonableness test in favor of certainly impending and the court sort of muses and wonders if it's really any different.

I'm asking you that question. Because certainly impending at least, I don't know, sort of linguistically sounds like a heavier burden than objectively reasonable. It has a certainty, right?

So, that's my question to you. That's why I'm going to ask you folks to brief this under these cases because nobody has, but, I mean, the standard appears to be certainly impending.

MR. TIERNEY: We have not briefed Blum versus Holder, your Honor. I'm not aware of whether it is a First Amendment case.

THE COURT: Oh yeah. Here's the Blum case. The Blum case has this big section, okay, in big bold letters, the law of standing for First Amendment pre-enforcement suits. Yet nobody in this litigation decided to brief it. And all it talks about is Clapper and Right to Life which people have touched on. But I, you know, it sets forth some pretty solid First Amendment law. And one of the major points here is this idea about whether the statute is moribund, not in this case, and if it's not moribund, whether it's been disavowed. And we're in a situation here where we don't

really have disavowal. We have a statute that the AG is saying is constitutional, and as far as I can interpret, has every intention of enforcing if a zone is created. All right?

And Right to Life, in Right to Life the court said the fact that the AG came into oral argument and said we defend the constitution of the statute, that's enough to say they're going to enforce it, and that inferred standing. That's a significant hurdle, I think, for the state to overcome here, but we don't have a developed argument and I do want to give them a chance, I mean that, to address it.

I didn't mean to cut you off. But you're going to have to be filling me in about that as well.

Let me, I guess, you know, here's a question for the other plaintiffs (sic). You know, there's been sort of, I don't know, conjecture thrown around. No present intention to enforce, no present intention to create a zone. We've seen some testimony before the legislature. Are you prepared to tell me what your clients' positions are at all, and I'm not suggesting you have to, you might not know, regarding the impending creation of any zones. Is it on the horizon? Are you just, have you just decided that it's too risky given the circumstances of the law here? You know, anybody

can go first, I don't mind. Mr. Lane, why don't you go first.

MR. CHIESA: We haven't been asked, your Honor. The police department hasn't been asked to do anything in this case and we're just following the directions of the AG. We didn't draft the legislation. I'm sure we're a subdivision of the state, but we haven't been asked to do anything. And, you know, I would suggest that, you know, perhaps there is standing against the state with regard to the statute, but with regard to the municipal defendants, I mean, we haven't been asked or done anything.

THE COURT: So, you sort of give me a much more blunt way. What Attorney Elliott gave me was we want out, right?

MR. CHIESA: Yes.

THE COURT: What about that. Let me ask you a question.

MR. TIERNEY: Absolutely.

THE COURT: I mean, why not cut these municipal defendants loose?

MR. TIERNEY: Absolutely, absolutely. Your Honor, I told them right from the get-go all they need to do is say that they're not going to enforce this statute and we will let them loose, okay, and --

THE COURT: Okay, so I guess he's asking the same question I just asked. What's your position on that? Mr. Chiesa, you can go first.

MR. CHIESA: We're here to follow what the AG says, your Honor, we're a subdivision of the state.

THE COURT: So are you saying -- let me ask you this. Are you saying you would not, the Manchester police wouldn't enforce the statute unless directed by the AG to do so?

MR. CHIESA: That they would not enforce -- if the AG told them not to enforce it, they wouldn't.

THE COURT: It's a little bit, yeah, it's a little bit of a negative photographic image of what I was asking. Are you prepared to enforce it before being given the green light to enforce it by the AG?

MR. CHIESA: If the AG tells us to enforce it, we will.

THE COURT: What if the AG says nothing yet?

MR. CHIESA: We will ask the AG.

THE COURT: Yeah. Anybody else? Mr. Lane.

MR. LANE: Well, I was just going to first comment on Mr. Tierney's argument that we should just basically concede the case. We don't want to take any position, and what he's asking us to do is concede that he's right.

THE COURT: I don't think he's asking that, unless I misunderstood. I think he's asking if, I think, and you tell me if I'm wrong because I don't want to drag people to court if they don't have anything to offer and they don't want to be here, I think what he's saying is if you're saying that you have no, not to concede that he's right, just that if you are agreeing not to enforce the statute in those communities, all right, he will dismiss you from the case.

MR. LANE: I view that as a distinction without a difference, your Honor. He's saying that if we don't enforce it, to me that is saying, okay, we are going to side with the plaintiffs, you know.

THE COURT: Oh.

MR. LANE: Part of the problem is that there are constituents on both sides of this issue in all of our clients. So we don't want share the position. And he's asking us to in fact take a position that we would enforce the standard.

THE COURT: While I don't agree that it's the same as conceding that he's correct on the merits, I do understand your point, I do.

MS. ELLIOTT: The only thing I would add, your Honor, is during all of the status reports, the updates, we did consult with both the town office and with the

police department and there had been no request in Greenland to set up any buffer. My understanding is that the parties all kind of get along in Greenland.

But I wanted to just add that we are in a tough position because we can't, a town can't just decide it's not going to enforce statutes. It doesn't have the authority to do that. The AG's office can disavow a statute, but the towns can't do that individually. And so we can't agree to what the plaintiffs are asking us to do. If we could, I mean, I'm sure all the municipalities would love to get out.

THE COURT: All right. Not that I begrudge you being here, you're always welcome here.

All right, Mr. Tierney, what else do you want to say?

MR. TIERNEY: If I may, your Honor, I know that the city and counties had raised some separate points from what was raised by the state in their separate motion, and I'd like to address that now unless because it's their motion they wanted to address it or the Court wanted to hear from them first on their particular motion. And I'm okay either going first or letting them go, whichever.

THE COURT: I don't think they want to be heard really. I don't think you have to worry about it.

MR. TIERNEY: Okay. I just didn't want to step on any toes.

THE COURT: No.

MR. TIERNEY: You know, the law is quite clear that when bringing a facial claim, okay, that the facial claim needs to be brought, and I'm quoting New Hampshire Right to Life pact case again, that the proper defendants are the government officials charged with administering and enforcing it, okay. That's right from the New Hampshire Right to Life pact case. They are the ones who have the authority to administer and to enforce it. They're the ones who would be the proper defendants unless of course they agree to give up their enforcement authority either temporarily until, you know, all the appeals in this case are dealt with and, you know, something along those lines, or permanently, you know, obviously we will take the permanently as well. But where they won't even agree to give the minutest temporary reprieve, that's why they're proper defendants, they need to be in this case.

They also argue that the abortion facilities themselves are necessary parties under Rule 19, and that this case needs to be dismissed because they requested that we bring Section 1983 actions against these private parties and we decline to do so. You know, the

plaintiffs don't have any claims against private actors in this case. If the cities and counties wanted to write claims against the private actors, we likely would assent to, you know, bring whatever claims they want to bring in the context of this case in the interest of judicial economy, but we don't have any claims against them.

The three factors under Rule 19 is that we can obtain complete relief against the present parties. We can obtain complete relief by having the statute declared facially unconstitutional or having the statute declared unconstitutional as applied to these particular locations. The size and the scope of whatever zone, whoever that authority may be delegated is quite frankly irrelevant to the claims we have brought in this case. It's relevant to the claims that the state wished we had brought, but not to the claims which we have actually brought in this case.

Finally, one, on the factors in the Rule 19 analysis, there needs to be some reason why, you know, the absent parties cannot now be brought into the case. And I'm not aware of any reason why, you know, the private parties who wanted to be a part of this action, why they couldn't move to intervene to do whatever they want to do, you know, that just isn't present here.

THE COURT: Yup.

MR. TIERNEY: There's an argument that there is a necessity of those private parties taking a step in order for the county and cities' enforcement authority to be exercised against the plaintiffs, and the fact that as they alleged that the private parties need to, you know, post zones of whatever is, you know, in their discretion to do, okay, does not divest us of standing. The First Circuit has spoken clearly in that Wine and Spirits case that the fact that it is indirect and that it may take some other party's actions in order for the plaintiffs to be injured does not divest the plaintiff of standing. The injury is clearly traceable to the actions of the defendants and therefore we have standing now.

Finally, the cities and counties have requested the Court order the plaintiffs to pay the cities' attorneys' fees and costs. That's quite frankly ludicrous, your Honor. There's no basis for that. It appears just to be an improper attempt to try to chill my clients from putting their First Amendment rights forward. It should be summarily denied. There's no basis for such a request.

THE COURT: All right. Let me ask you this, Attorney Lahey. Actually, if you want --

MR. LANE: Attorney Lane or Attorney Lahey, I'm sorry?

THE COURT: Attorney Lahey. I'm sorry. You may have wanted to say some thing. I will let you go first.

MS. LAHEY: Okay. I have just a couple quick points that I will take in the order that they came up.

First to the statement that we're ignoring the facial challenge. I don't think that's the case nor do I think the Court thinks that's the case for the reasons that we've talked about.

THE COURT: Yeah.

MR. TIERNEY: Two, I'd like to hit on this point of the test is threat of enforcement. It's not threat of creation. And so this kind of hypothetical --

THE COURT: But now you're just playing semantic games.

MS. LAHEY: I don't think I am, and the reason that I'm not is once the zone has been created, then you're in enforcement world and then all of this discussion that we're having is implicated. But before that point, there is nothing to enforce.

So there's no --

THE COURT: Let's me ask you a question. If that's the case, you know, you're not just in here

defending the constitution of the statute. You've been insisting over and over that this injunction, that you agreed to, by the way, and later claimed that you didn't in a pleading, by the way, you've been insisting that this injunction doesn't apply. If you can't enforce this, why are you insisting that the injunction that prevents you from enforcing it is something that you can't labor under the yoke of?

MS. LAHEY: Well, well, I don't think we ever agreed to an injunction, we agreed to a stay, and I think --

THE COURT: You didn't agree to an injunction, you agreed to a stay.

MS. LAHEY: Yes.

THE COURT: But you put in a pleading that despite the lack of any jurisdiction, the Court imposed it when you agreed to it, and that was like the first of a few sort of I thought strange assertions you made in your pleadings. Don't make any difference now. But I have to wonder why.

What is the problem with the injunction? There was never an injunction, but what is the problem with the terms of it given that you say you can't enforce the statute anyway? You're saying you can't enforce the statute. There's nothing to worry about

here. But yet don't anybody be under the impression that we are bound not to enforce the statute when you agreed to it. And then you put in a pleading, when I lifted the stay, you were no longer enjoined.

Didn't you argue that? I can read it back to you if you want.

MS. LAHEY: Well, I take, I guess I'm taking issue with enjoined. I don't think we ever agreed to an injunction, I think we agreed to a stay which I see is different, and the reason that we would never agree to an injunction is that --

THE COURT: You don't have to say this. You didn't agree with an injunction, I agree with you.

MS. LAHEY: Okay.

THE COURT: You agreed to a stay.

MS. LAHEY: Sure.

THE COURT: But under the terms of the stay you agreed not to enforce the statute.

MS. LAHEY: Right.

THE COURT: Yet when the stay was lifted, okay, you said we are not prohibited from enforcing the statute now.

MS. LAHEY: Well --

THE COURT: How is the Court supposed to take you seriously that you have no intent to enforce the

statute, okay, when you're insisting that not only is it constitutional, which is a very dubious claim to make, you know, the idea that this is a clearly constitutional statute because of the legislative history, like terms, that's, I'm not saying it's unconstitutional because I think we haven't really explored that yet, but it's definitely got problems.

MS. LAHEY: Sure.

THE COURT: Okay.

MS. LAHEY: And I don't think I've ever represented that it's clearly constitutional.

THE COURT: Okay, you haven't represented that.

MS. LAHEY: Okay, so I guess --

THE COURT: Attorney Lahey, you've got to break this habit of interrupting me.

MS. LAHEY: Sorry.

THE COURT: I know you don't mean to, but you've got to stop. I'm trying to ask you a question.

I'm trying to ask you how I can take you seriously that you have no present intention of enforcing this statute when you strive so mightily to say that there's nothing prohibiting you from doing it. I mean, it was very important to you in several pleadings to make sure that you say we didn't agree to

this and now that the stay has been lifted there's nothing stopping us, it doesn't apply to us anymore, these terms of the stay don't apply. Now, you put in a footnote we'll still inform the Court if we intend to enforce it, which I appreciate, but still, the law of the case law says if you're not disavowing enforcement, there's probably standing. There are a lot of cases that say that, including First Circuit authority, New Hampshire Right to Life, Blum, and there's been no disavowal here. The only disavowal that you've been willing -- let me just ask you.

If the town of Greenland establishes a zone tomorrow, are you disavowing enforcement during at least the pendency of the litigation, are you disavowing enforcement at all?

MS. LAHEY: So if the town of Greenland created a zone tomorrow? Without speaking with the Attorney General I can't answer that definitively, but I would at least go as far as to say it's possible -- we wouldn't -- I can't tell you either way, but I'm not going to tell you --

THE COURT: I have to ask you this. You don't think that coming in here today, given all the law about disavowal, that that should be a question you're prepared to answer today before talking to the Attorney

General?

MS. LAHEY: Well, the reason that I, I have had a conversation with the Attorney General about it, and the reason that we can't take a position of yes or no is because we don't know the underlying facts.

THE COURT: Of the zone, okay.

MS. LAHEY: So if tomorrow a zone is created in Greenland because somebody was shot, we're going to enforce that I would imagine. If the town of Greenland creates a zone tomorrow --

THE COURT: So now you're invoking people being shot in a statute where we're at 12(b)(6) and there's no disagreement that -- let's not go there.

MS. LAHEY: Well, no, and I think that gets to --

THE COURT: I don't think you got to enforce this statute if somebody gets shot in Greenland, right? My question for you is, let's assume a zone was created tomorrow that, you know, I don't know, seemed to be justified by whatever the people in the place thought circumstances justified. People had crossed the line a little bit. Maybe got aggressive with their so-called counseling, right, which is, you know, it's demonstrating in some point, I understand that, and the zone was created and it was, I don't know, 19-and-a-half

feet. Someone was really careful about creating a zone. My question for you is, does the AG disavow enforcement of this statute, because that's a critical factor in this analysis?

MS. LAHEY: I don't, without knowing the underlying facts, I doesn't couldn't say whether the Attorney General would disavow it.

THE COURT: Depends on the zone and the situation.

MS. LAHEY: Right. And that said, I don't think that this case, given where we are with no zone, that disavowal is the linchpin. Now, I think it would be the linchpin if we had a zone created and I was standing up here saying I can't disavow it, then I think all of those cases are implicated. But we aren't to that point yet because no zone has been created, so there's nothing for us to disavow.

THE COURT: Sure, but that goes to my question for you earlier about what really, what in the statute constrains the creation of a zone. What in the statute constrains its size undertake 25(b). The circumstances under which it's created. The configuration. The time -- when a clinic decides to create one. And I ask the municipalities, all right, the street enforcement authority and they say there's nothing in your

consultation rights or consultation function here that let's them participate in any sort of discussion like that. There's nothing to guide a clinic in this statute whatsoever about when to do a zone, how big the zone should be up to 25 feet, or the circumstances triggering the creation of a zone. Zero.

So, if the fact that no zone has been created is so important, isn't it significant that there's really nothing in the statute to stop that from happening, as the plaintiffs point out, in five minutes?

MS. LAHEY: No. And I think that, what you just described would go to the merits. It doesn't go to standing. And one piece that I would like to touch on and potentially have the opportunity to brief is that we have never understood the initial complaint to raise a nondelegation question, and so we have never addressed that.

THE COURT: Because it's count two, right?

MS. LAHEY: Correct, count two.

THE COURT: You want to take a look at that now?

MS. LAHEY: Yeah, I mean, so count two --

THE COURT: Actually I think I have it here. Jadean gave me a superduper notebook. Let me see here. Is the complaint in here? No, okay. So, anybody have

an opinion about that?

MS. LAHEY: It's just something that at least we've never understood to be the case. We talked about it in a nondelegation context, but there's a difference between nondelegation and the Fifth Amendment. It's just I never read it to mean that, so we haven't --

THE COURT: So, I guess the question comes down to whether I read it that way, and I'll figure it out, but I don't really need to figure it out right now. I don't think I -- yeah.

MS. LAHEY: Okay. So I think going to your question that the nature of the delegation of the power goes to the merits and that the case law, and I haven't gone through it extensively because I never briefed it, but my initial reading is that the delegation itself is not sufficient to confer standing. You need the party to whom the power or authority is delegated to actually exercise that authority, and that hasn't happened here.

THE COURT: Wait a minute. Wait a minute. You're saying that if -- you're saying that if power was delegated to Planned Parenthood, or pick your clinic, to say if I want to walk outside with a sandwich board, I have to bring the sandwich board to Planned Parenthood and they have to approve the message. I have to wait for them to either approve or not approve before

challenging that as improper delegation to a private party of restrictions on free speech? That would seem to be a --

MS. LAHEY: So what I have, what I've done is I pulled the New Hampshire nondelegation cases, and none of them have squarely addressed the standing inquiry, but in all of them that I found that addressed the procedural --

THE COURT: The delegated party took action.

MS. LAHEY: Yes. And that's what prompted the litigation, so that's what I'm representing to you.

THE COURT: Fair enough.

MS. LAHEY: I'd like to hit on again the difference between discretion to create and discretion to, or threat of creation and threat of enforcement, and the standard is threat of enforcement.

All of this pre-creation discussion, it's hypothetical. What if they do this? What if they create a ten-foot zone today and 20-foot zone tomorrow? That's all speculation. That doesn't get you standing. What the Court should do is wait and see what the party does. If they create a zone that looks like that and it switches day by day, then you could address the merits of that, but this --

THE COURT: Yet when I suggested I grant your

motion to dismiss, okay, and let's wait to see if something happens, somehow that was unacceptable.

MS. LAHEY: Well, the reason it was --

THE COURT: When I wanted to grant your motion to dismiss.

MS. LAHEY: Well, I can tell you, can I tell you, I guess --

THE COURT: Maybe not.

MS. LAHEY: Yeah, it's something that's been raised here, I think we've even discussed it with the Court, the hang-up was the attorney's fees. So it wasn't that --

MR. TIERNEY: I disagree, your Honor, that was not --

THE COURT: Okay, okay, you disagree, I get it. Fair enough. Let me ask you this. You've gone so far, I've asked you about disavowal and you give me I think a good faith answer, because in your papers, I mean, I'm looking for the language, you don't disavow, but you go to the depth of saying that enforcement is not even remotely possible, all right. Yeah, a couple times. Page 11 of document 63-1 which I think is your renewed memorandum of law. Plaintiffs cannot demonstrate that prosecution under the statute is likely at this time or even remotely possible because they

cannot show a credible threat of enforcement.

That entire argument is based on no zone demarcation yet, no zone creation.

MS. LAHEY: Correct.

THE COURT: All right. That's what it comes down to.

All right, here's what I want to do. Actually, let me take a break. Let me take a quick break and we will convene in a few minutes. I want to give the reporter a break. She's been going for about an hour and a half. So we'll take a ten-minute break.

MR. TIERNEY: Will I be able to respond?

THE COURT: Of course.

MR. TIERNEY: Okay.

(Recess taken.)

THE COURT: Okay. I'm pretty much ready to wrap up here. Mr. Tierney, you said you wanted to say something.

MR. TIERNEY: Yes. Thank you, your Honor. First I want to correct something that I think I misspoke, I may have even miswritten in the pleadings that the unbridled discretion theory was in count two. I just looked at it. It's actually in count one, in particular paragraphs 105 --

THE COURT: We were calling it improper

delegation, right?

MR. TIERNEY: I'm sorry, yes, improper delegation.

THE COURT: Which is where the unbridled discretion lies here but, if it's anywhere, so it's not count two, it's count one?

MR. TIERNEY: It's in count one, correct.

THE COURT: I think you might have mislabeled count two. Count two looks likes it says delegation but it really talks about Vegas.

MS. LAHEY: Right.

MR. TIERNEY: And I apologize. I think that's exactly what happened. Is that we had thrown things under the wrong heading, and I apologize, but it is there in perhaps 105 to 108.

THE COURT: Thank you.

MR. TIERNEY: The test as far as threat of enforcement versus threat of creation, I don't think the Court has to go very far on that. The SBA List, that's the same argument state of Ohio made, the Wine and Spirit case, that's the same argument the state of Rhode Island made, and the U.S. Supreme Court as well as the First Circuit have both rejected the argument that the state is making here today.

THE COURT: Well, what argument in particular,

what Supreme Court and First Circuit cases have rejected that, this idea that creating a zone is a significant difference, significant barrier?

MR. TIERNEY: Well, what they're arguing is that because there is a step that needs to take place prior to the enforcement, okay, that that means that you can't have any enforcement. That's the same argument state of Ohio made in the SBA List because you didn't have that complaint by the ideological opponent to the election board prior to the state being authorized under its statute to take any enforcement action. The same argument that was made in the Wine and Spirits case, okay, that you had an independent action that wasn't the state's action that needed to take place in order for the state to have that enforcement power. And in both cases, okay, the fact that there was other action that needed to take place wasn't relevant or wasn't divesting of standing. Both cases were focused just on the issue of standing.

So, it's important of course to remember that we're arguing that the delegation of that power to control the sidewalk is itself unconstitutional regardless of whether that power is ever exercised. But even if, as the state argues, that you need to show enforcement power prior to their being standing, that's

contrary to what the Supreme Court and the First Circuit has held.

As the Court has already alluded to, none of the parties address Blum, and we would appreciate if the state is going to address Blum that we have the opportunity to respond to that in some way.

THE COURT: Sure.

MR. TIERNEY: But, you know, the Blum and Clapper decisions had focused on the fact that their analysis is particularly rigorous, that's the word that was used, when asked to decide whether action taken by one of the other two branches of the federal government --

THE COURT: That's action of other branches of the federal government. That's not the case here, that's right.

MR. TIERNEY: Correct. And it's also important that in Blum you have the government disavowing affirmatively, which isn't the case here. So, if there's going to be some consideration to the applicability of Blum, we don't think it is applicable because you don't have the disavowment and you don't have a federal government actor, but if the state is going to file something, we'd like, you know, whatever ability to respond to that.

THE COURT: Ms. Lahey, anything you want to say?

MS. LAHEY: Yes, I just have two points. The first is their statement about the SBA List case. That case is different than ours. So, in that case the statute at issue on its face bans certain speech. So you couldn't criticize a candidate during an election cycle.

THE COURT: It was content-based.

MS. LAHEY: But that wasn't conditioned on anything. It's not that that can be prohibited if another actor defines what speech is banned. I mean, I was just the statute says this speech is banned period, and there was enforcement authority.

THE COURT: Well, was the enforcement authority, I haven't read that case I'm going to tell you now, was that triggered by the filing of a complaint, is that the issue? So your point is that it's like this case in the sense that there's a condition precedent to enforcement. Sua sponte that authority could not enforce.

MR. TIERNEY: Correct.

MS. LAHEY: But I think the court found that the complaint process itself was, that created the injury, and so when you were going -- when you have to

go before I think it was a commission, that's creating your injury. Here, the creating of the zone doesn't create an injury. It's the threat of enforcement that creates an injury. But you need to have that creation, and then once you have that creation, then you can have threat of enforcement which will create the injury. But you can't conflate and say that the process of having a complaint brought against you and somebody creating a limitation are the same things. The statute in Susan B. Anthony, there was no condition precedent to the conduct that was prescribed. Here there's a condition precedent to the conduct that's prohibited, and that's the difference.

THE COURT: So here -- I want to follow your reasoning. Here there's a condition precedent to the conduct that's prohibited because you mean the conduct being the, I don't know, communicating in the zone?

MS. LAHEY: Right. So the statute as it exists now doesn't ban any speech. What it does is authorizes a facility to create --

THE COURT: A zone.

MS. LAHEY: -- a zone which if that zone is created, then speech is affected. But here in Susan B. Anthony, on its face the statute prevented certain speech. And one of the factors that the court looked

at --

THE COURT: Yeah, in the complaint it would be about conduct that already occurred.

MS. LAHEY: Right. And so in that case the court found that there was standing based predominantly on two factors. One, that there had already been a finding of probable cause against one of the parties. And the other one -- there were two plaintiffs in that case. There had already been a finding of probable cause against one of them, so therefore the statute had already been enforced against one of them. And the other one couldn't rely on that prior finding of probable cause to get their threat of enforcement. And then two, that the complaint could be raised by anybody, and so that there were an unlimited number of people who could bring this complaint, that the court said that created increased harm because anybody could complain, drag you in front of the commission which they equated to litigation which you'd have to incur costs and it could take you out of the election cycle. So that's not what we have here.

And then just the second piece is I want to be clear that your position, Attorney Tierney, is that the delegation --

THE COURT: He was saying that his delegation

argument --

MS. LAHEY: Is in paragraphs 105 --

THE COURT: 105 through 108 in count one if I understood him correctly.

MS. LAHEY: Yeah, so I don't read, the word delegation doesn't appear in there. It talks about unbridled discretion. So again, I'd just like to reiterate, to the extent that the Court reads it that way --

THE COURT: Certainly -- here's what the Court reads. I don't know whether their counts make an improper delegation cause of action or grounds for cause of action. I don't know that. I don't know how much difference it makes vis-à-vis standing. Probably not much. I do think -- I am of the opinion that the clinics are afforded a great deal of discretion to create zones here with zero guidance from the statute. The only limitations on the discretion of the clinics in creating the zones are the 25-foot maximum radius and the requirements of consultation, signage and demarcation. That's all I can find in the statute. But whether that, you know, so I do find there to be a lot of discretion. I don't have an opinion about whether their complaint asserts a cause of action for improper delegation. Certainly, though, it's obvious here that

there is in some sense some delegation going on.

MS. LAHEY: Correct. And I think I've made this point but those, the question about whether there are any constraints on that delegation go to the merits and that it doesn't go to standing.

THE COURT: It doesn't implicate standing as far as you're concerned.

MS. LAHEY: Correct.

THE COURT: Okay.

MS. LAHEY: And so but to the extent the Court sees differently we'd like the opportunity to brief it because we never understood that to be a claim. In speaking with counsel outside I think they briefed that argument in one of their motions, but that was only because it had come up in a status conference that took place after we had filed our pleadings, so.

THE COURT: All right.

MS. LAHEY: That's it.

MR. LANE: Your Honor, could I say one more thing?

THE COURT: Of course you may.

MR. LANE: In response to our motion Mr. Tierney said that the case law establishes that the proper defendants are the enforcement authorities. I just want to make clear. We don't disagree with that in

the normal case. You would normally, if the municipal authorities already had the power to enforce something, then we'd be appropriate defendants in this situation. But this is not the normal case. And that's the whole point, is that until an event precedent occurs, my client and the other municipal defendants don't have any authority to enforce anything, therefore the case law that he's talking about just simply doesn't address the situation at all.

THE COURT: All right. Here is what I want to do. I've sort of grouchily pointed out a few times now the parties didn't brief what I think are important cases, the First Circuit case Blum and its reliance on Clapper. So I want to give you a chance to either tell me that, as Mr. Tierney just did, that those cases don't have any bearing on this case or how they bear on the case. In other words brief, add to your briefing a little bit incorporating Clapper and Blum. And if you want to talk about that Rhode Island case, feel free, or any other case you want, you know, cases are cases, but I want to hear about those cases because Blum is a pretty, it's a little survey of the law on this topic and this case presents a unique fact with this demarcation as a prerequisite to enforceability. And when I analyze this I'll probably analyze it under both

the interpretations you've advanced in the statute, the plaintiffs' interpretation that the zones already exist and the defendants' that they don't exist until demarcation, I'll probably analyze both ways just to make sure I'm covering the bases. But that said, I do think at least at this point that the defendants' interpretation is more plausible. But I'm going to order you to do a little more briefing in this case. I guess I want to ask you -- let's go off the record.

(Off the record.)

THE COURT: I was considering, I was considering, I don't know if any of you consulted, I was considering asking the New Hampshire Civil Liabilities Union to file an amicus brief in this case. I don't know which side of this issue they'd be on to be honest. Maybe you do. Has anybody consulted with them at all?

MS. LAHEY: Well, I can tell you that I spoke with Attorney Bissonnette socially about it, so I know they are aware of it and have thoughts on it. I didn't necessarily talk to him about the standing issue. I talked to him more about the merits.

THE COURT: It's a very good point because they probably have a lot, I wouldn't be surprised if they are very aggressive on standing but maybe have a different view of the -- I don't know.

MS. LAHEY: Correct, so I know it's in their radar.

THE COURT: I think they're pretty much pro standing under all circumstances, right?

MR. TIERNEY: I have also had conversation was Attorney Bissonnette and he's explained to me the conflict that he faces with free speech and the abortion rights.

THE COURT: Of course. That's the whole point of this case.

MR. TIERNEY: I think that the New Hampshire ACLU would like to stay out of it.

THE COURT: I see.

MR. TIERNEY: So as not to --

THE COURT: So my sense is you think it's a nonstarter?

MR. TIERNEY: Correct.

THE COURT: Yeah. All right. Thank you. I appreciate your presentations and I look forward to your filings and we'll get a resolution.

MR. TIERNEY: Thank you, your Honor.

MS. LAHEY: Thank you.

(Hearing adjourned at 4:15 p.m.)

C E R T I F I C A T E

I, Sandra L. Bailey, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 4/29/2016

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LICENSED COURT REPORTER, NO. 15
STATE OF NEW HAMPSHIRE